Public Prosecutor v Hassan bin Hj Ali Basri

HIGH COURT (KOTA KINABALU) — NO TWU-45SO-8/4 OF 2013
RAVINTHRAN J
6 AUGUST 2013

Criminal Law — Penal code — s 130M — Terrorist act — Armed intrusion — Information of armed intrusion in Lahad Datu — Omission to give information to superior — Whether accused had reason to believe terrorist act would be committed — Whether legally bound to give information to superiors — Whether omitted to give information — Whether deliberately withheld information — Whether prosecution established prima facie case — Whether case proven beyond reasonable doubt — Criminal Procedure Code s 182A

Evidence — Motive — Admissibility — Information of armed intrusion — Admissibility in criminal offence — Failure to give crucial information to superior — Motive as corroborative evidence — Whether cogent and credible evidence of motive tendered — Whether accused intentionally did not disclose information — Whether accused had good relationship with Sulu Sultanate — Evidence Act 1950 s 8

Evidence — Witness — Identification — Whether witness identity should be protected — Whether avail opportunity to cross-examine — Security Offences (Special Measures) Act 2012 s 14

Evidence — Admissibility — Power to intercept communication — Intercepted communication — Interception of telecommunication conversation — Whether done personally by authorised police officer — Whether evidence of interception communication admissible — Whether unfairness or prejudice occasioned to accused — Security Offences (Special Measures) Act 2012 s 6

Evidence — Statement — Unsworn statement from dock — Probative value — Whether can of itself raise doubt on prosecution case — Whether unsworn statement could be brushed aside — Whether raised reasonable doubt in prosecution's case — Whether accused unsworn statement must be considered in totality and together with whole evidence — Criminal Procedure Code s 182

Police — Duties of police — Duty of police officer — Lawful directions — Duty to obey — Information about group of men moving towards Lahad Datu to stake

territorial claim — Entail commission of terrorist acts — Omission to give information to superior — Whether breach of lawful duty — Whether omission intentional — Police Act 1967 s 20(1)

The accused, a corporal attached to the Special Branch of the Royal Malaysian Police Force in Lahad Datu, was charged with the offence of omitting to disclose information pertaining to a terrorist act. The trial against the accused proceeded under the Security Offences (Special Measures) Act 2012 ('the SOSMA'). The case for the prosecution was that the accused possessed information pertaining to the armed intrusion by a group of foreigners from the Philippines into Kampung Tanduo, in the district of Lahad Datu, Sabah. The accused was alleged to have been in possession of this information as early as January of 2013. However, he withheld all this crucial information from his superiors. The superior officers of the accused testified that the accused was legally bound to give them the said information and that he omitted to do so. They also testified that a group of armed intruders landed in Kampung Tanduo in February 2013 and in the ensuing clash with Malaysian security forces, two Malaysian police personnel died. The crucial witnesses who gave evidence to support the case for the prosecution were PW1 and PW2, both of whom had been accorded protected witness status pursuant to SOSMA. It was the prosecution case that PW1 had passed information pertaining to armed intrusion into Sabah to the accused in January 2013. According to PW1, when he was selling fish in Bungao in the Philippines, he came across men wearing camouflage uniforms with the words 'Royal Sulu Force' written on their uniform. From his conversation with them in the Suluk Language, he learnt that 1,500 men had gathered in Pulau Siminul and had planned entry into Sabah to stake a territorial claim of the state. Further, the prosecution tendered three non verbatim transcriptions of intercepted telephone conversations through PW2, an administrative assistant attached to the Special Branch Division at the Federal Police Headquarters, namely, P5, P6 and P7. It was the prosecutions case that the content of the intercepted telephone conversations corroborated the prosecutions case that the accused knew of the impending armed intrusion into Sabah and terrorist acts that were committed. Hence, the issue for the determination was whether the accused had reason to believe that a terrorist act would be committed and that he omitted to give the said information; and whether the accused was legally bound to transmit the said information to his superiors.

Held, convicting and sentencing the accused with the offence charged:

(1) The prosecution had tendered credible evidence that the accused had reason to believe that a terrorist act would be committed. PW1 was obviously an informer of the Special Branch as he said that he cooperated with the police ('kerjasama dengan dia orang'). PW1 took the trouble to contact the accused to pass him this information. There was undisputed evidence that the accused person was a Special Branch officer and was

A tasked with gathering intelligence on the security threat posed by the so-called Sulu Sultanate because of its territorial claim on Sabah. Therefore, based on the evidence of PW1 alone, the prosecution had tendered credible evidence that the accused had 'reasons to believe' that 'a terrorist act' would be committed. Apart from the information given by PW1, the testimony of PW2 and the non verbatim transcripts of the conversation (P6 and P7) between the accused and the unidentified 'lelaki Sabah' also constituted credible evidence that the accused had further 'reasons to believe' that 'a terrorist act' would be committed (see para 42).

(2) As an officer with the Special Branch tasked with gathering intelligence on the Sulu threat in a frontline district such as Lahad Datu, the accused had been lawfully directed by his superior officers to transmit important information pertaining to the said threat. Therefore, the accused was 'legally bound' to pass the information to his superiors. It would be patently obvious to any reasonable person that information about a group of men in camouflage uniforms moving towards the Lahad Datu coastline to stake a territorial claim would entail commission of terrorist acts. However, the accused failed to give the said information to his superiors even at the police briefing prior to his arrest. As the accused did not give the crucial information that he received from PW1 or other information that he was privy to as evidenced by P6 and P7, it must be taken that he omitted to give information intentionally. The legal maxim that a man is presumed to have intended his acts also applies to his omissions (see para 52).

(3) Absence of motive is generally not relevant in law for the reason that motive is not an ingredient of criminal offences. However, evidence of motive is admissible under s 8 of the Evidence Act 1950 as motive can provide corroborative evidence. In the instant case, the prosecution had also tendered cogent and credible evidence of motive in respect of the failure of the accused to give crucial information to his superiors. The prosecution was correct to submit that the accused intentionally did not disclose the information that he received from PW1 and the information that was contained in P6 and P7 because he had a good relationship with the Sulu Sultanate (see paras 53 & 55).

(4) Adverse inference need not be drawn against the prosecution for not calling Inspector Yusri and Inspector Syazwan because their evidence was not necessary to unfold the narrative upon which the prosecution case was based. PW1 clearly said that the information in question, ie that 1,500 men in the Philippines were planning to enter Sabah to stake a territorial claim, was given only to the accused. The failure of the accused to disclose this information to his superiors was the gravamen of the

charge against him. Therefore, Inspector Yusri and Inspector Syazwan could not possibly fill in gap in the prosecution story (see para 56).

(5) The defence disclosure in the unsworn statement was unbelievable. It was simply a bare denial which was unsupported by credible evidence. Further, the unsworn statement, when considered in its totality and evaluated in the light of the prosecution evidence, did not raise a reasonable doubt against the whole of the prosecution case. Hence, the prosecution had proved the guilt of the accused beyond reasonable doubt (see para 84).

(6) A deterrent sentence was called for in this case. The accused was not an ordinary member of the public. He served as a Special Branch officer in the front line District of Lahad Datu. The accused had deliberately withheld crucial information pertaining to armed intrusion into Sabah by foreigners who in all likelihood were staking a territorial claim. He had betrayed his country by withholding critical information that could have saved lives. His betrayal had directly or indirectly threatened the security of the country. The sentencing court was also obliged to strike a balance between the personal circumstances of the accused and the public interest. The mitigating factors based on the long service of the accused and his previous good character pales into insignificance when compared to the enormity of his crime. Therefore very little credit should be given to these factors. For the same reason, the poor health of the accused was not relevant either (see para 88).

(7) The maximum punishment for the offence is seven years imprisonment and fine. The established principle of sentencing is that the maximum penalty is intended only for the worst cases where the feelings of the community have been outraged: *Sia Ah Kew & Ors v Public Prosecutor* [1974] 1 MLJ 125. In this case, although the accused was a first time offender, for reasons given above, it was appropriate to impose the maximum penalty of seven years imprisonment from date of his arrest (see para 88).

[Bahasa Malaysia summary

Tertuduh, korporal yang bertugas dengan Cawangan Khas Pasukan Polis Diraja Malaysia di Lahad Datu, telah dituduh kerana kesalahan tidak menyampaikan maklumat berhubung tindakan pengganas. Perbicaraan terhadap tertuduh dimulakan di bawah Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('AKKLK'). Kes untuk pendakwaan adalah bahawa tertuduh mempunyai maklumat tentang pencerobohan bersenjata oleh sekumpulan orang asing daripada Filipina ke Kampung Tanduo, di daerah Lahad Datu, Sabah. Tertuduh dikatakan mempunyai maklumat ini sejak Januari 2013. Walau bagaimanapun, dia menyembunyikan semua maklumat penting ini daripada ketuanya. Pegawai atasan tertuduh memberi keterangan

bahawa tertuduh terikat dari segi undang-undang untuk memberitahu mereka tentang maklumat tersebut dan bahawa dia tidak melakukan sedemikian. Mereka juga memberi keterangan bahawa sekumpulan penceroboh bersenjata telah berlabuh di Kampung Tanduo dalam bulan Februari 2013 dan dalam pertembungan berikutannya dengan pasukan keselamatan Malaysia, dua anggota polis Malaysia telah terbunuh. Saksi-saksi penting yang memberi keterangan untuk menyokong kes pendakwaan adalah PW1 dan PW2, kedua-duanya telah diberikan perlindungan status saksi menurut AKKLK. Adalah kes pendakwaan bahawa PW1 telah menyampaikan maklumat berhubung pencerobohan bersenjata ke Sabah kepada tertuduh dalam bulan Januari 2013. Menurut PW1, semasa dia menjual ikan di Bungao di Filipina, dia berjumpa beberapa lelaki berpakaian seragam penyamaran dengan perkataan 'Royal Sulu Force' tertera pada pakaian seragam mereka. Berdasarkan perbualannya dengan mereka dalam bahasa Sulu, dia mendapati 1,500 orang lelaki telah berkumpul di Pulau Siminul dan telah merancang masuk ke Sabah untuk mendapatkan tuntutan wilayah negeri itu. Selanjutnya, pendakwaan telah mengemukakan tiga transkripsi non verbatim tentang perbualan telefon yang telah dipintas melalui PW2, seorang pembantu tadbir yang bertugas di Bahagian Cawangan Khas di Ibu Pejabat Polis Persekutuan, iaitu, P5, P6 dan P7. Ia adalah kes pendakwaan bahawa kandungan perbualan telefon yang dipintas itu menyokong kes pendakwaan bahawa tertuduh mengetahui pencerobohan bersenjata yang akan berlaku di Sabah dan tindakan keganasan yang akan berlaku. Oleh itu, isu untuk ditentukan ialah sama ada tertuduh mempunyai sebab untuk mempercayai bahawa tindakan pengganas akan dilakukan dan bahawa dia gagal untuk memberikan maklumat tersebut; dan sama ada tertuduh terikat dari segi undang-undang untuk menyampaikan maklumat tersebut kepada pegawai atasannya.

Diputuskan, mensabitkan dan menghukum tertuduh atas kesalahan yang didakwa:

(1) Pendakwaan telah mengemukakan keterangan yang boleh dipercayai bahawa tertuduh mempunyai sebab untuk mempercayai yang tindakan pengganas akan berlaku. PW1 jelas seorang penyampai maklumat Cawangan Khas kerana dia menyatakan bahawa dia bekerjasama dengan polis ('kerjasama dengan dia orang'). PW1 telah bersusah payah berhubung dengan tertuduh untuk menyampaikannya maklumat ini. Terdapat keterangan yang tidak dipertikaikan bahawa tertuduh adalah pegawai Cawangan Khas dan ditugaskan untuk mengumpul risikan mengenai ancaman keselamatan yang ditimbulkan oleh apa yang dikenali sebagai Kesultanan Sulu kerana tuntutan wilayah ke atas Sabah. Oleh itu, berdasarkan keterangan PW1 sahaja, pihak pendakwaan telah mengemukakan bukti yang boleh dipercayai bahawa tertuduh mempunyai 'sebab untuk percaya' bahawa 'tindakan pengganas' akan dilakukan. Selain daripada maklumat yang diberikan oleh PW1,

testimoni PW2 dan transkrip non verbatim perbualan (P6 dan P7) di antara tertuduh dan 'lelaki Sabah' yang tidak dikenali juga merupakan bukti yang boleh dipercayai bahawa tertuduh lagi mempunyai 'sebab untuk percaya' yang 'tindakan pengganas' akan berlaku (lihat perenggan 42).

(2) Sebagai pegawai Cawangan Khas yang bertugas untuk mengumpul risikan mengenai ancaman di kawasan barisan hadapan seperti Lahad Datu, tertuduh telah diarahkan dengan sah oleh pegawai atasannya untuk menyampaikan maklumat penting yang berkaitan dengan ancaman tersebut. Oleh itu, tertuduh telah 'terikat di sisi undang' untuk menyampaikan maklumat tersebut kepada pegawai atasannya. Adalah lebih ketara kepada mana-mana orang yang munasabah bahawa maklumat mengenai sekumpulan lelaki dalam pakaian seragam penyamaran yang bergerak ke arah pantai Lahad Datu adalah untuk memperoleh tuntutan wilayah yang akan melibatkan berlakunya tindakan pengganas. Walau bagaimanapun, tertuduh gagal untuk memberikan maklumat tersebut kepada pegawai atasannya walaupun semasa taklimat polis sebelum ditangkap. Oleh kerana tertuduh tidak memberi maklumat penting yang diterimanya dari PW1 atau maklumat lain yang diketahuinya seperti yang dibuktikan oleh P6 dan P7, maka boleh dianggap bahawa orang itu gagal untuk memberikan maklumat dengan sengaja. Maxim undang-undang bahawa seorang lelaki itu dianggap mempunyai tujuan terhadap tindakan di mana ia juga adalah terpakai untuk kegagalannya tidak berbuat demikian(lihat perenggan 52).

(3) Ketiadaan motif adalah pada umumnya tidak relevan dalam undang-undang atas sebab motif itu bukan elemen kesalahan jenayah. Walau bagaimanapun, bukti motif boleh diterima di bawah s 8 Akta Keterangan 1950 kerana motif boleh memberikan bukti yang nyata. Dalam kes ini, pihak pendakwaan juga telah mengemukakan bukti yang meyakinkan dan motif yang boleh dipercayai berkenaan kegagalan tertuduh untuk memberi maklumat penting kepada pegawai atasannya. Pendakwaan adalah betul untuk mengemukakan hujah bahawa tertuduh dengan sengaja tidak mendedahkan maklumat yang diterimanya dari PW1 dan maklumat yang terkandung dalam P6 dan P7 kerana dia mempunyai hubungan yang baik dengan Kesultanan Sulu (lihat perenggan 53 & 55).

(4) Inferens tidak perlu dibuat terhadap pihak pendakwaan yang tidak memanggil Inspektor Yusri dan Inspektor Syazwan kerana bukti mereka tidak perlu untuk mengungkap naratif yang memberi asas kepada kes pendakwaan. PW1 jelas mengatakan bahawa maklumat yang dipersoalkan, iaitu bahawa 1,500 lelaki di Filipina merancang untuk memasuki Sabah kerana menuntut wilayah itu, telah diberikan hanya

kepada tertuduh. Kegagalan tertuduh untuk mendedahkan maklumat ini kepada pihak atasan adalah sebab pertuduhan terhadapnya. Oleh itu, Inspektor Yusri dan Inspektor Syazwan tidak mungkin mengisi jurang dalam cerita pendakwaan (lihat perenggan 56).

(5) Pendedahan pembelaan dalam kenyataan tanpa sumpah itu tidak boleh dipercayai. Ia hanya penafian biasa yang tidak disokong oleh keterangan yang boleh dipercayai. Bahkan, kenyataan tanpa sumpah itu, apabila diambil kira keseluruhannya dan dinilai berdasarkan keterangan pendakwaan, tidak menimbulkan keraguan munasabah terhadap keseluruhan kes pendakwaan. Justeru, pendakwaan telah membuktikan kebersalahan tertuduh melampaui keraguan munasabah (lihat perenggan 84).

(6) Hukuman pencegahan adalah wajar dalam kes ini. Tertuduh bukan ahli biasa dalam masyarakat awam. Dia berkhidmat sebagai pegawai Cawangan Khas di barisan hadapan Daerah Lahad Datu. Tertuduh dengan sengaja menyembungikan maklumat penting berhubung pencerobohan bersenjata ke Sabah oleh orang asing yang dalam semua kebarangkalian ingin mendapat tuntutan wilayah. Dia telah mengkhianati negaranya dengan tidak menyampaikan maklumat penting itu yang mungkin dapat menyelamatkan nyawa. Pengkhianatannya secara langsung dan tidak langsung mengancam keselamatan negara. Hukuman mahkamah juga wajar mengimbangi antara keadaan peribadi tertuduh dan kepentingan awam. Faktor-faktor mitigasi berdasarkan perkhidmatan lama tertuduh dan ciri-ciri baiknya sebelum ini menjadi tidak penting jika dibandingkan dengan betapa besarnya jenayah itu. Oleh itu kredit yang sangat sedikit perlu diberikan kepada faktor-faktor ini. Atas sebab yang sama, kesihatan tertuduh yang kurang baik juga tidak relevan (lihat perenggan 88).

(7) Hukuman maksimum kerana kesalahan ini adalah tujuh tahun penjara dan denda. Prinsip tetap tentang hukuman adalah penalti maksimum bertujuan hanya untuk kes-kes yang paling teruk mana telah menimbulkan kemarahan masyarakat: *Sia Ah Kew & Ors v Public Prosecutor* [1974] 1 MLJ 125. Dalam kes ini, walaupun tertuduh merupakan pesalah kali pertama, atas sebab-sebab yang diberikan di atas, ia adalah sesuai untuk mengenakan hukuman maksimum tujuh tahun penjara dari tarikh dia ditangkap (lihat perenggan 88).]

Notes

For a case on duty of police officer, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 1342.

For a case on identification, see 7(2), *Mallal's Digest* (4th Ed, 2013 Reissue) para 3282.

For cases on unsworn statement from dock, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2989–2995.

Cases referred to

Abdul Karim Kula v PP [2009] 10 CLJ 1, HC (refd)
Ahmad bin Ishak v PP [1974] 2 MLJ 21 (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Chiew Poh Kiong v PP [2001] 4 MLJ 280; [2001] 7 CLJ 249, HC (refd)
Chung Kok Yeang v PP [1941] 1 MLJ 163 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507; [1999] 1 CLJ 829, FC (refd)
Juraimi bin Husin v PP; Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537, CA (refd)
Kuruma, Son of Kaniu v The Queen [1955] AC 197, PC (refd)
Lee Boon Gan v Regina [1954] 1 MLJ 103 (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
Mohamed Salleh v PP [1969] 1 MLJ 104, FC (refd)
PP v Mohd Amin bin Mohd Razali & Ors [2002] 5 MLJ 406; [2002] 5 CLJ 281, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
R v Sang [1980] AC 402, HL (refd)
R v Sargeant [1975] 60 Cr App R 74 (refd)
In Re Kah Wai Video Ipoh Sdn Bhd [1987] 2 MLJ 459 (refd)
Saw Kim Hai v Anor v Reg [1956] 1 MLJ 21 (refd)
Sia Ah Kew & Ors v PP [1974] 1 MLJ 125, CA (refd)
Udayar Alagan & Ors v PP [1962] 1 MLJ 39, CA (refd)
Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 4 MLJ 141, FC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 182A
Evidence Act 1950 s 8
Penal Code ss 26, 43, 103(a), (b), 130b(2), 130C, 130M
Police Act 1967 s 20(1), (3)
Security Offences (Special Measures) Act 2012 ss 6, 6(1), (c), 14, 14(2), (3), (4), 17, 24

Nordin bin Hassan (Nazrul Nizam bin Mohd Zameri, Cheng Heng Kher and Anati Kisahi with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Kamarudin bin Mohmad Chinki (Ram Singh and YS Lo with him) (Chang & Kamarudin) for the accussed.

Ravinthran J:

INTRODUCTION

[1] The accused is a corporal attached to the Special Branch of the Royal Malaysian Police Force. He was based in Lahad Datu. The charge against him is that he omitted to disclose information pertaining to a terrorist act. The trial against the accused proceeded under the Security Offences (Special Measures) Act 2012 Act 747 ('the SOSMA'). Briefly stated, the case for the prosecution was that the accused possessed information pertaining to the armed intrusion by a group of foreigners from the Philippines into Kampung Tanduo which is located in Sabah's Lahad Datu District in February of 2013. The accused is alleged to have been in possession of this information as early as January of 2013. He is also alleged to have possessed information about plans by foreign intruders to send reinforcements to Kampung Tanduo. However, he withheld all the secrucial information from his superiors. The superior officers of the accused testified that the accused was legally bound to give them the said information and that he omitted to do so. They also testified that a group of armed intruders landed in Kampung Tanduo on 12 February 2013 and in the ensuing clash with Malaysia Security Forces, two Malaysian police personnel died.

THE CHARGE

[2] The charge against the accused is as follows:

> Bahawa kamu, di antara Januari 2013 dan 3 Mac 2013, di Pejabat Ketua Cawangan Khas Daerah, Ibu Pejabat Polis Daerah Lahad Datu, dalam Daerah Lahad Datu, dalam Negeri Sabah, yang mempunyai sebab untuk mempercayai bahawa suatu perbuatan keganasan iaitu kesalahan yang boleh dihukum di bawah seksyen 130C Kanun Keseksaan akan dilakukan, meninggalkan dengan sengaja daripada memberi apa-apa maklumat berkenaan dengan kesalahan itu, yang kamu terikat di sisi undang-undang untuk memberi, dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 130M Kanun yang sama.

[3] The English translation supplied by the prosecution is as follows:

> That you, between January 2013 and 3 March 2013, at the office of the Head of the District Special Branch, Lahad Datu District Police Headquarters, in the District of Lahad Datu, in the State of Sabah, having reason to believe that an offence punishable under section 130C of the Penal Code, to wit, a terrorist act will be committed, intentionally omits to give any information respecting that offence, which you are legally bound to give, and thereby you have committed an offence punishable under section 130M of the same Code.

THE TEST OF PRIMA FACIE CASE

[4] I shall first direct myself on the test of prima facie case. The test of a prima facie case is whether the prosecution had adduced credible evidence to prove each ingredient of the offence which if unrebutted or unexplained would warrant a conviction (s 180 of the Criminal Procedure Code). In the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, the test of a prima facie case is stated as follows:

> … ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted.

[5] In the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 which was cited by the learned DPP, the Federal Court cited *Mozley and Whiteley's Law Dictionary* (11th Ed), which defined 'prima facie case' as follows:

> A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

[6] The Federal Court then explained the duty of the court at the end of the case of the prosecution as follows:

> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

[7] With the above principles in mind, I shall first discuss the evidence of two crucial witnesses (protected witness 1 and protected witness 2) and the rulings I made in respect of the same.

RULING ON PROTECTED WITNESS

[8] Section 14 of the SOSMA provides for the giving of evidence by a witness in a special manner to protect his or her identity. A protected witness

would not be seen or heard by the accused or his counsel. Under s 14(2) the court is required to hold an inquiry in camera by questioning the witness concerned or any other witness in the absence of the accused and his counsel for the purpose of satisfying itself as to the need to protect the identity of the witness. Upon determination by the court that a witness is in need of protection, sub-ss 14(3) and 14(4) would operate to prevent the disclosure of the identity of the witness. The provisions read as follows:

> 14(3) If after such inquiry the court is satisfied as to the need to protect the identity of the witness, the evidence of such witness shall be given in such manner that he would not be visible to the accused and his counsel, but would be visible to the court; and further if the witness fears that his voice may be recognized, his evidence shall be given in such manner that he would not be heard by the accused and his counsel.
>
> (4) The court may disallow such questions to be put to the witness as to his name, address, age, occupation, race or other particulars or such other questions as in the opinion of the court would lead to the witness's identification.

[9] Prior to the commencement of the trial, upon the application of DPP under s 14, I held an inquiry in camera and granted 'protected witness' status to two prosecution witnesses who were thenceforth known as protected witness no 1 ('PW1') and protected witness no 2 ('PW2'). My ruling is recorded in the notes of proceedings at p 3 as follows:

> Court: I have conducted inquiry under section 14 on two proposed protected witnesses who I shall refer to as Protected Witness 1 and 2. I did not record their names in the notes of proceedings as that would defeat the purpose of the application. Their names correspond to Protected Witness 1 and 2 as recorded in the Investigation Papers. I hereby order the DPP to make such a note in the IP. I am satisfied that the said two witness are in need to protection under section 14.

[10] I deliberately did not record the questions I posed to the witnesses or their answers during the inquiry in the notes of proceedings as that could give clues to their identity. It should be noted that even during cross-examination, questions that could lead to the identification of a protected witness are barred (see s 14(4) of the SOSMA). When the protected witnesses gave evidence, they were not visible to the accused and his counsel. The protected witnesses had been placed in a secured room in the court premises. The secured room was connected to the open court via a video and audio link. The video images were displayed only on the computer screen of the judge. The audio link was made available to the judge, DPP and the court interpreter. The questions of the DPP and counsel for accused were posed to the protected witnesses through the court interpreter who relayed the questions through the audio link to the

protected witnesses. The answers of the witnesses were also relayed back to the court through the same manner. This procedure was adopted in order to comply with s 14(3) that I reproduced above.

THE EVIDENCE OF PROTECTED WITNESS NO 1

[11] The crucial witnesses who gave evidence to support the case for the prosecution are protected witness No 1 ('PW1') and protected witness No 2 ('PW2'). It is the prosecution's case that PW1 had passed information pertaining to armed intrusion into Sabah to the accused in January of 2013. PW1 told the court that when he was selling fish in Bungao in the Philippines, he came across men wearing camouflage uniforms in some boats. Although, PW1 cannot spell, he noted that the words 'Royal Sulu Force' was written on their uniform. He said as follows during cross-examination:

Q: You testified that you saw a wordings on the 20 persons dressed in oren belang-belang. Can you repeat those words and spell it?

A: Royal Sulu Force. Saya tidak pandai eja. Besar tulisan dia.

Q: I put it to you there is a difference to the words 'Sulu' or 'Suluk'.

A: Yang saya tengok Sulu saja yang ditulis.

[12] Some of them boarded his boat as they thought that he was going to Pulau Siminul. From his conversation with them in the Suluk Language, he learnt that 1,500 menhad gathered in Pulau Siminul and were planning to enter Sabah and stake a territorial claim. He said as follows:

Q: Adakah kamu dengar berapa orang berkumpul di Simunul?

A: Aku dengar 1,500 yang berkumpul.

Q: Ada kamu dengar kenapa mereka berkumpul di Simunul?

A: Ada.

Q: Mengapa mereka berkumpul di Simunul yang kamu dengar?

A: Memasuki Sabah.

Q: Ada kamu dengar mengapa mereka mahu memasuki Sabah?

A: Mahu menuntut Sabah.

[13] PW1 said that he passed this information to the accused in person when they met at an ice cream shop in Lahad Datu. He noticed that the accused jotted down this information on a piece of paper. The reason he did so was because a Special Branch officer in the Lahad Datu Police Station by the name of Tuan Yusry had told him to pass information to the accused if he was not around. He also told the accused three days later by telephone that four boats

(known as pintel in the local language) had entered Bangkuran in Lahad Datu. PW1 had also reminded the accused not to ignore the information that he passed to him. He testified as follows:

> Q: Setelah kamu memaklumkan kejadian di Bungao di Filipin ada kamu memberi peringatan kepada Koperal Hassan?
>
> A: Ada.
>
> Q: Apa peringatan yang kamu berikan?
>
> A: Jangan abaikan hal ini. Kasitahu orang atasan.

[14] During cross-examination, PW1 denied that he only told the accused about the imminent entry of illegal immigrants and not about intrusion of the 'Royal Sulu Force'. PW1 also denied that he had given national security related information to two other police officers, ie Tuan Yusri and Inspector Syazwan and that he wanted to make the accused a scapegoat. I find that PW1 had given credible evidence about the information that he passed to the accused. Although he is a 'protected witness' under the SOSMA, counsel for accused had full opportunity to cross-examine him through the court interpreter. He answered all questions confidently and without hesitation. I cannot think of any reason why he would want to incriminate a police officer such as the accused. There was no suggestion put to him that he had underlying reason to fabricate evidence. PW1 appeared to have no motive at all to do so. Furthermore, he stood up well to cross-examination.

EVIDENCE OF PROTECTED WITNESS NO 2

[15] The second crucial witness was protected witness no 2 (PW2). She is an administrative assistant attached to the Special Branch Division at the Federal Police Headquarters in Bukit Aman, Kuala Lumpur. Her duties include processing information obtained through intercepted communications. She is fluent in Bahasa Malaysia, Suluk and Bajau. The prosecution tendered three non verbatim transcriptions of intercepted telephone conversations through her, ie P5, P6 and P7. It is the prosecution's case that the content of the intercepted telephone conversations corroborated the prosecution's case that the accused knew of the impending armed intrusion into Sabah and terrorist acts that were committed. PW2 told the court that she did not know the individuals but recognised their voices and the names by which they referred to each other because she had listened in to previous intercepted conversations that were not tendered in evidence. I shall now refer to the two of the intercepted telephone conversation transcripts, ie P6 and P7.

[16] P6 is in respect of a telephone conversation between the accused and a man referred to by PW2 as 'lelaki Sabah'. It was the latter who made the call to

the accused. This conversation was recorded on 2 March at 7.37pm. In this transcript, the 'Lelaki Sabah' is heard telling the accused that 400 more soldiers would enter Sabah as back up forces (*untuk membantu*) and that they consists of MNLF and the Sultan's forces. Part of the conversation in P6 is as follows:

> Lelaki Sabah bertanya jika sudah berperang, Hassan mengiyakan semalam dan tunggu 'dia' menyerah diri.
>
> … Lelaki Sabah menyatakan ada dimana dikatakan ramai yang akan masuk ke Sabah daripada Bungao untuk membantu. Hassan maklum dan bertanya berapa ramai yang dikatakan mahu masuk. Lelaki Sabah menjawab 'lebih 400 orang'. Hassan bertanya adakah jumlah tersebut terdiri daripada askar MNLF. Lelaki Sabah berkata sudah bercampur dengan Sultan. Hassan maklum.

[17] P7 is a telephone conversation recorded on 3 March 2013 at 9.28am between the accused and 'lelaki Sabah'. Part of the transcript reads as follows:

> Hassan mengiyakan tetapi alasan Esmail Kiram hanya mahu menuntut hak mereka dan jika Kerajaan Malaysia tidak turuti mereka akan huru harakan Sabah seperti yang mereka telah lakukan sekarang. Hassan menambah 'mereka itu' dikatakan akan menghantar orang masuk ke Sabah.
>
> … Hassan menambah orang-orang yang masuk itu menggunakan taktik gerila untuk masuk seperti yang Nur Misuari katakan sebelum ini.

[18] The non verbatim transcript in P6 that was recorded by PW2 is clear evidence that the accused possessed information that 400 more foreign intruders would arrive to lend support to those already present in Kampung Tanduo since 12 February 2013. Similarly, P7 constitutes clear evidence that the accused had knowledge that foreign intruders were keen on staking a claim on Sabah and were willing to create disorder and anarchy through guerrilla tactics to achieve their objectives.

[19] P5 is a transcript of a conversation between one Datu Amir Bahar and a so-called Raja Muda Agbimudin about the role of the accused in supplying them information. I shall advert to the significance of P5 at a later stage in this judgment.

WHETHER P5, P6 AND P7 ADMISSIBLE IN EVIDENCE?

[20] During the course of the trial and at the close of the case for the prosecution, counsel for the accused submitted the P5, P6 and P7 are not admissible in evidence for the following reasons.

[21] The first ground canvassed by counsel for the accused is that PW2 was not given any authority to intercept the said communications under s 6 of the

SOSMA. He submitted that only the officer who was authorised by the public prosecutor under s 6 could intercept the communications in question. I find that there is no merit in this submission. Section 6(1) of the SOSMA in part reads as follows:

> 6 Power to intercept communication
>
> (1) Notwithstanding any other written law, the Public Prosecutor, if he considers that it is likely to contain anyinformation relating to the commission of a security offence, may authorize any *police officer* —
>
> (a)-(b)
>
> (c) to intercept or listen to any conversation by any communication. (Emphasis added.)

[22] In the instant case, DPP Dato' Mohamad Hanafiah ('PW17') exercised the power of the public prosecutor under s 6(1) of SOSMA and issued a written authorisation (P25) to a police officer, namely Supt Anuar bin Ahmad ('PW16) who is attached to the Special Branch, to intercept the telephone communication of the accused. Supt Anuar bin Ahmad then asked for assistance from the Technical Operations Division. PW2 whose duties include processing of intercepted of telecommunication conversations also came on board to assist Supt Anuar bin Ahmad as she is fluent in the Suluk and Bajau Languages. She told the court that she worked in the Special Branch as well and acted under the instruction of Supt Anuar bin Ahmad when she intercepted and translated the telephone conversations in question. Learned counsel for the accused submitted that s 6 of the SOSMA had been breached because the authorisation to intercept was only given to Supt Anuar bin Ahmad and not to PW2. In my opinion, there is no requirement for Supt Annuar to personally intercept, listen in and translate telephone conversations pursuant to the authority granted to him under s 6 of SOSMA. It is sufficient that the said tasks were carried out under his direction and supervision as is the case here. Otherwise, no meaningful interception can be done if the police officer authorised by the public prosecutor under s 6 of SOSMA does not understand the language in which the telephone conversation in question was conducted. Nonetheless, counsel for the accused submitted that the plain words of s 6(1) require the interception to be done personally by the authorised police officer and no other. In my view, this cannot be the law as the authority given to intercept could be rendered useless. Counsel for the accused also argued that PW2 is not a police officer and therefore cannot be authorised to intercept telephone conversations. PW2 told the court that her job designation is 'administrative assistant'. However, this argument can be dismissed for the same reasons. There is no doubt that Supt Anuar bin Ahmad had been properly authorised to intercept the communications in question. Therefore as long as another officer or staff, whether police personnel or otherwise, had carried out the interception under his direction and supervision, the requirement under

s 6(1) must be deemed to have been satisfied. Finally, counsel for the accused argued that the maxim from public law, ie delegatus *non potest delegare* had been breached because Supt Anuar has no power to 'delegate' his authority to PW2. As explained earlier, on the evidence, I do not find any 'delegation'. PW2's role was purely technical in natureas she understood the Suluk language. Therefore I rule that there is no breach of s 6 of the SOSMA.

[23] However, assuming that counsel for the accused is correct in his submission that the interception under s 6(1) must be personally executed by the authorised police officer, I agree with the learned DPP that the evidence obtained in this case, ie P5, P6 and P7, is nonetheless admissible. This is because improperly obtained evidence is admissible in our system of law as long as they are relevant. In the Privy Council case of *Kuruma, Son of Kaniu v The Queen* [1955] AC 197, Lord Goddard CJ (1955) said as follows:

> In Their Lordships' opinion, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

[24] *Kuruma, Son of Kaniu v R* has been consistently applied by our courts since as early as 1956 (see *Saw Kim Hai v Anor v Reg* [1956] 1 MLJ 21). However, it must be noted that the principle enunciated in *Kuruma, Son of Kaniu v R* is not a new principle. *In Re Kah Wai Video Ipoh Sdn Bhd* [1987] 2 MLJ 459 Edgar Joseph JR J said as follows when referring to the dictum of Lord Goddard CJ in *Kuruma*'s case:

> His Lordship was, of course, not making new law when he penned those oft-quoted words for the principle he referred to was well-settled, in this country, long before that (see, for example, *Saminathan v Public Prosecutor* [1937] 1 MLJ 39 per Aitken J.)

[25] In *R v Sang* [1980] AC 402, Lord Diplock said as follows in relation to admission of evidence of an agent provocateur:

> For the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for the reasons.

[26] The above passage was cited with approval by the Federal Court in *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141. However, in *Kuruma, Son of Kaniu v R*, Lord Goddard CJ had qualified his dictum by saying:

A No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

[27] This qualification was expressly approved and applied in *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 829 by the Federal Court:

B In *Kuruma, Son of Kaniu v R* [1955] 1 All ER 236 PC Lord Goddard CJ, relying on *Noor Mohamed v R* [1949] 1 All ER 365 at page 370 and *Harris v Public Prosecutions Director* [1952] 1 All ER 1044 at p 1048 said (at p 239):

C No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

And he suggested that evidence obtained from an accused, for example, by trick might be excluded.

D In our instant case the learned trial judge had entertained grave doubt as to the voluntariness of the s 27 information of the accused. That being so, it was open to the trial court to exercise its discretion whether to let in the information as part of the trial. The learned trial judge had not exercised the discretion.We are therefore at liberty to exercise. In our view, the principle of fairness requires the discretion to be exercised in excluding the information.

E

[28] In the instant case,as I pointed out earlier, it is plainly impossible for an authorised officer such as Supt Anuar to intercept and translate a conversation which is conducted in a language that he does not understand. Therefore it is F difficult for one to imagine what unfairness or prejudice could have been occasioned to the accused when PW2 who worked under the supervision of the Supt Anuar typed P5, P6 and P7 after listening to the intercepted conversation. In the premises there can be no valid suggestion that P5, P6 and P7 were obtained by unfair means. P5, P6 and P7 relate to the knowledge of the accused G in respect of the movement of foreign intruders. Therefore, they have high probative value and are relevant. For this reason they are admissible.

[29] The second ground that counsel for the accused raised is the fact that the intercepted telephone conversations were not transcribed verbatim. H Counsel for accused submitted that P5, P6 and P7 are only a summary. This objection is not valid for the following reason. Section 24 of the SOSMA provides that any information obtained through an interception of communication under s 6 shall be admissible as evidence. It must also be noted that s 24 is in Part VI of the SOSMA. Section 17 provides that:

I This Part shall have effect notwithstanding anything inconsistent with the Evidence Act 1950 [Act 56].

[30] In the premises, a non verbatim transcript of a telephone conversation

is admissible. As to the weight to be attached to such evidence, the normal evidentiary rules should apply. PW2 told the court when cross-examined that she recorded P5, P6 and P6 accurately. She also disagreed that she did not immediately write down what she heard. This is what she said during cross-examination:

Q: Saya katakan kepada kamu bahawa kandungan perbualan di dalam eksibit P5 adalah tidak betul. Ya atau tidak.

A: Saya hanya bercakap apa yang saya dengar.

…

Q: Saya katakan kepada kamu bahawa kandungan perbualan telefon di dalam P6 adalah tidak benar.

A: Tidak setuju.

…

Q: I put it to you that at the time of interception on 19 February (twice) and 20 February 2013, you did not write down the tele-conversation at the same time listening to it.

A: Tidak setuju.

Q: I put it to you that the contents of P5, P6 and P7 are not the truth as what you listen.

A: Tidak, saya bercakap benar.

[31] During re-examination, PW2 repeated that P5, P6 and P7 contain information from the said intercepted communications. As the witness was confident about the content of the non verbatim transcripts, I see no reason not to accept her evidence.

[32] The third ground on which counsel for the accused objected to P6 and P7 is that the prosecution did not tender the records of incoming calls in the itemised bills of the accused to prove that the interception of telephone conversation was between 'Lelaki Sabah' and the accused. However, PW2 testified that she identified the voice of the accused because of previous interceptions that she had done and she knew his hand phone number. She said as follows during examination-in-chief:

Q: Bagaimana kamu boleh tahu panggilan telefon ini dibuat kepada Koperal Hassan?

A: Melalui pintasan komunikasi yang dibuat sebelum ini.

Q: Dari pintasan komunikasi sebelum ini, bagaimana kamu boleh tahu identiti Koperal Hassan?

A: Melalui pintasan komunikasi sebelum ini ada menyebut identiti masing-masing.

Q: Dalam maklumat ini identiti yang kamu maksudkan identiti siapa?

A: Hassan.

Q: Berdasarkan maklumat pintasan yang kamu buat, apa nombor telefon Koperal Hassan?

A: 0138888359.

[33] In the premises, due weight should be given to her evidence and in my opinion, the failure to tender the itemised billing telephone records of the accused is not fatal.

THE ELEMENTS OF THE OFFENCE

[34] Section 130M of the Penal Code reads as follows:

> 130M Intentional omission to give information relating to terrorist
>
> Whoever knowing or having reason to believe that any offence punishable under sections 130c to 1301 has been or willbe committed intentionally omits to give any information respecting that offence, which he is legally bound to give,shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

[35] The ingredients of the offence under s 130M are as follows:

(1) That the accused had 'reasons to believe' that 'a terrorist act' will be committed.

(2) That he omitted to give that information respecting the section 130C offence.

(3) That he was legally bound to give information respecting the section 130C offence.

[36] I shall now consider whether the accused had 'reason to believe' that 'a terrorist act' will be committed and that he omitted to give the said information.

MEANING OF 'REASON TO BELIEVE'

[37] 'Reason to believe' in s 26 of the Penal Code is defined as follows:

> A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing, but not otherwise.

[38] In *Ahmad Bin Ishak v Public Prosecutor* [1974] 2 MLJ 21 which was cited by the learned DPP, Arulanandom J elucidated on the meaning of 'reason to believe' as follows:

> Now, 'reason to believe', knowledge, intention, are things in a man's mind and you cannot see it, you cannot hear it. Nobody who receives stolen goods carries a big banner saying that these are stolen goods. Nor does he shout from the roof tops. You must look into the circumstances and consider if the circumstances are such that any reasonable man could see sufficient cause to believe that it was stolen.

[39] Thus the test for 'reason to believe' in s 26 is an objective test. The question that arises is whether a reasonable person in the position of the accused had reason to believe that 'a terrorist act' would be committed. Counsel for the accused submitted that the information from PW1 that 1,500 people were gathering in Pulau Siminul was only hearsay as the source of the information was not revealed. Section 130M does not require the information that is possessed by the accused to be information that is admissible in a court of law. It is suffices if a reasonable person would believe that a terrorist act was imminent. Therefore, the argument that the information that was received by PW1 in the Philippines was based on hearsay is not relevant.

MEANING OF 'TERRORIST ACT'

[40] 'Terrorist act' is defined in s 130b(2) and 130b(3) of the Penal Code. Section 130b(2) provides as follows:

> (2)For the purposes of this Chapter, 'terrorist act' means an act or threat of action within or beyond Malaysia where—
>
> (a)the act or threat falls within subsection (3) and does not fall within subsection (4);
>
> (b)-(c)

[41] Sub-section (3) of s 130(b) provides as follows:

> (3) An act or threat of action falls within this subsection if it—
>
> (a) involves serious bodily injury to a person;
>
> (b) endangers a person's life;
>
> (c) causes a person's death;
>
> (d)-(k)

WHETHER THE ACCUSED HAD 'REASONS TO BELIEVE' THAT 'A TERRORIST ACT' WILL BE COMMITTED?

[42] In my opinion, the prosecution had tendered credible evidence that the

A accused had reason to believe that a terrorist act would be committed. PW1 is obviously an informer of the Special Branch as he said that he cooperated with the police ('kerjasama dengan dia orang'). He saw a group of men wearing camouflage uniforms in Bungao in the Philippines. They were headed towards the Sabah coastline. From his conversation with some of them who wanted to B board his boat, he learnt that their purpose was to stake a territorial claim on Sabah. PW1 took the trouble to contact the accused to pass him this information. There is undisputed evidence that the accused person was a Special Branch officer and was tasked with gathering intelligence on the security threat posed by the so-called Sulu Sultanate because of its territorial C claim on Sabah. SAC Zulkifli bin Abd Aziz ('PW4'), the Deputy Head of the Special Branch in Sabah testified that the accused was given this task because he is fluent in the Suluk and Bajau Languages and had ties with Sulu community in Lahad Datu. There is also undisputed evidence that on 12 February 2013, a large group of heavily armed men wearing camouflage uniforms with the words D 'Royal Sulu Force' landed in Kampung Tanduo in Lahad Datu and occupied the village. In the ensuing confrontation with the police, two Malaysian police personnel were killed in action and a number were injured. Mohd Ali Bin Asmali ('PW3'), an auxiliary policeman told the court that on 12 February 2013, when he was returning from the sea around the Kampung Tanduo area, E he saw about 100 men wearing camouflage uniforms on the beach. SAC Zulkifli went to Kampung Tanduo on three occasions on 14–16 of February 2013 to investigate if the foreigners had taken hostages and to find out about their objectives. He met one Raja Muda Agbimudin who was the leader of the armed group in military fatigues bearing the words 'Royal Sulu Force'. The said F Raja Muda Agbimudin told him that their intention was to claim Sabah and that they would not leave Kampung Tanduo. SAC Zulkifli noticed that the men were armed with automatic rifles and flew the Sulu Sultanate flags in the area. Supt Mancha ak Ata ('PW5') of the VAT 69 unit of the police force told the court that two of his men were killed by the armed foreigners in Kampung G Tanduo on 1 March 2013. Dr Amir Saad bin Abdul Rahim ('PW9') confirmed that the said men died of gunshot wounds. Now, the information that the accused received from PW1 was about a group of men wearing military uniforms with the words 'Royal Sulu Force' written on it. He was told by PW1 that they wanted to claim Sabah. It is therefore completely foreseeable that the H actions of the said men would involve the harm envisaged in sub-ss 3(a)–(b). Therefore, the submission of counsel for the accused that the prosecution failed to tender evidence that the accused had reasons to believe that any offence of 'terrorist act' will be committed is without merit. In point of fact, the actions of the armed men who were seen by PW1 did cause two deaths in their encounter I with the VAT69 unit on 1 March 2013. Therefore, based on the evidence of PW1 alone, the prosecution had tendered credible evidence that the accused had 'reasons to believe' that 'a terrorist act' would be committed. However, there is also corroborative evidence to hold that the accused had 'reasons to believe' that 'a terrorist act' would be committed. In the conversation captured

in P6, the accused is apparently privy to information that 400 soldiers from the MNLF and the Sultanate's forces would be entering Sabah to assist the intruders who had entrenched themselves in Kampung Tanduo. In the conversation captured in P7, it is apparent that the accused is in the loop or at least has knowledge with regard to the plans of the intruders to create anarchy and chaos in Sabah. Therefore, apart from the evidence of PW1 who had given information to the accused about the objective of the men whom he met in Bungao to enter Sabah and stake a territorial claim, P6 and P7 corroborates the case of the prosecution that the accused had such knowledge.

[43] I also find that the testimony of PW2 and the non verbatim transcripts of the conversation (P6 and P7) between the accused and the unidentified 'Lelaki Sabah' also constitute credible evidence thatthe accused had further 'reasons to believe' that 'a terrorist act' will be committed apart from the information given by PW1. My reasons are as follows. It is granted that by the time the conversations in P6 and P7 were intercepted on 2–3 March 2013, an armed 'Royal Sulu Force' had landed in Kampung Tanduo on 12 February 2013. Learned counsel for the accused put to SAC Zulkifli during cross-examination that the sea around Kampung Tanduo had been cordoned off. In my opinion, even if the reinforcement force of 400 armed intruders did not arrive in Kampung Tanduo as discussed in P6 and P7, the accused was legally obliged to disclose the said information as s 130M refers to terrorist acts that 'has been committed' or 'will be committed'. Therefore, the information that the accused was privy to as evidenced by P6 and P7 comes within the ambit of the words 'will be committed' in s 130M which is cast in the past tense as well as the future tense.

WHETHER THE ACCUSED FAILED TO GIVE THE SAID INFORMATION?

[44] The accused is a Special Branch officer with the rank of corporal. He was attached to the Lahad Datu District Police Headquarters at the material time. He is fluent in the Suluk and Bajau languages. It is for this reason that he was assigned to gather intelligence on the threat posed by the Sulu claim on Sabah and report to his superior officers. The evidence in respect of this fact was given by the SAC Zulkifli and ASP Noraidin AG Maidin. SAC Zulkifli testified as follows:

> Q: Adakah pegawai-pegawai dan anggota tertentu di Cawangan Khas Sabah yang bertanggungjawab dalam siasatan dan risikan berkaitan Kesultanan Sulu dan ancamannya?
>
> A: Ada.
>
> …

A

Q: Adakah tertuduh di antara yang terlibat di dalam siasatan dan risikan berhubung ancaman Kesultanan Sulu?

A: Ya, dia terlibat.

Q: Apakah tugas tertuduh berhubung ancaman Kesultanan Sulu ini?

B

A: Tugas tertuduh adalah menjalankan segala risikan dan menyalurkan maklumat kepada Ketua Cawangan Khas Lahad Datu.

Q: Siapa Ketua Cawangan Khas Lahad Datu?

A: ASP Noraidin.

C

[45] The head of the Special Branch at the Lahad Datu District Police Headquarters at the material time was ASP Noraidin bin AG Maidin ('PW12'). He corroborated the evidence of SAC Zulkifli on this point as

D follows:

Q: Di Cawangan Khas Daerah Lahad Datu adakah ada mana-mana pegawai atau anggota yang ditugaskan untuk membuat siasatan dan risikan berhubung Kesultanan Sulu dan ancamannya?

E

A: Ada.

Q: Adakah tertuduh di antara anggota yang terlibat berhubung siasatan dan ancaman Kesultanan Sulu?

A: Ya, betul.

F

Q: Berhubung dengan sebarang maklumat yang diperolehi oleh pegawai atau anggota Cawangan Khas Daerah Lahad Datu, kepada siapa maklumat itu perlu dilaporkan?

A: Kepada saya.

G

[46] Thus from the testimony of SAC Zulkifli and ASP Noraidin, the accused's duties as a Special Branch officer in Lahad Datu included gathering information on the Sulu threat and transmitting the said information to his superior officers. However, the accused failed to transmit the information given

H to him by PW1 and the information that he was privy to in P6 and P7 to his superior officers.

[47] The prosecution tendered credible evidence through ASP Noraidin bin AG Maidin (PW12) on this point. He told the court as follows:

I

Q: Mohon saksi dirujuk P6. Adakah maklumat 400 orang daripada Banguo akan masuk Sabah untuk membantu jika berlaku peperangan dilaporkan oleh tertuduh kepada kamu?

A: *Tidak.*

Q: Adakah maklumat 400 orang terdiri askar MNLF telah bercampur dengan Sultan dilaporkan oleh tertuduh kepada kamu secara lisan atau bertulis? **A**

A: *Tidak.*

…

Q: Adakah maklumat ini penting? **B**

A: Ya, penting.

Q: Mohon saksi dirujuk P7. Daripada maklumat P7, adakah maklumat Esmail Kiram hanya mahu menuntut hak mereka dan jika Malaysia tidak turuti, mereka akan huru-harakan Sabah dan mereka itu dikatakan akan menghantar orang masuk Sabah. Adakah maklumat ini dilaporkan secara lisan atau bertulis kepada kamu oleh tertuduh? **C**

A: *Tidak.*

Q: Adakah maklumat 'orang-orang yang masuk itu menggunakan taktik gerila untuk masuk seperti yang Nur Misuari katakan' sebelum ini dilaporkan secara lisan atau bertulis kepada kamu? **D**

A: *Tidak*

Q: Adakah maklumat ini penting? **E**

A: Ya, penting

Q: Mohon saksi dirujuk P3. Sila lihat paragraph 1(i)(a) dan (b). Adakah maklumat ini dilaporkan secara lisan atau bertulis kepada kamu?

A: *Tidak.* **F**

Q: Adakah maklumat ini penting?

A: Ya, penting.

Q: Mohon rujuk pada paragraph 1(ii)(a)(b)(c) dan (d). Adakah maklumat ini dilaporkan secara lisan atau bertulis kepada kamu oleh tertuduh? **G**

A: *Tidak.*

Q: Sila lihat paragraph 1(iii). Adakah maklumat dilaporkan secara lisan atau bertulis kepada kamu oleh tertuduh?

A: *Tidak.* **H**

Q: Rujuk paragraph 1(iv). Adakah maklumat dilaporkan secara lisan atau bertulis kepada kamu oleh tertuduh?

A: *Tidak.*

… **I**

Q: Adakah maklumat 1500 orang Esmail Kiram sedang berkumpul di Pulau Simunul dekat Bungao, Filipina untuk memasuki dan menuntut Sabah dimaklumkan secara lisan atau bertulis kepada kamu oleh tertuduh?

A: *Tidak.*

A

Q: Adakah maklumat 4 buah tempel masuk ke Bangkuran, Lahad Datu dimaklumkan secara lisan atau bertulis kepada kamu oleh tertuduh?

A: *Tidak.*

Q: Dan adakah maklumat-maklumat ini penting dan melibatkan keselamatan negara?

B

A: Ya.

Q: Sepanjang kamu bertugas sebagai Ketua Cawangan Khas Lahad Datu, adakah tertuduh ada memberi apa-apa maklumat berhubung Kesultanan Sulu dan ancamannya kepada kamu?

C

A: Tidak ada. (Emphasis added.)

[48] SAC Zulkifli testified that the accused did not give to him any
D information relating to the Sulu threat and the intrusion at Kampung Tanduo either. Sergeant Major Safuan bin Sairi ('PW13') was the immediate superior of the accused at the material time. His testimony on this point was similar to that of ASP Noraidin. The accused did not give any information to him pertaining to the intelligence gathered from PW1 and his knowledge in respect
E of the matters discussed in P6 and P7. Both ASP Noraidin and Sergeant Major Safuan bin Sairi told the court that the accused did not give the relevant information either orally or in writing.

WHETHER 'LEGALLY BOUND TO' TO GIVE INFORMATION?

F

[49] I shall now consider whether the accused was 'legally bound to' transmit the said information to his superiors. 'Legally bound to' is defined in s 43 of the Penal Code as follows:

G

43 'Illegal', 'unlawful' and 'legally bound to do'

The word 'illegal' or 'unlawful' is applicable to everything which is an offence, or which is prohibited by law, orwhich furnishes ground for a civil action. And in respect of the word 'illegal', a person is said to be 'legally bound to do' whatever it is illegal in him to omit.

H

[50] As noted by Ian Chin J in *Chiew Poh Kiong v Public Prosecutor* [2001] 4 MLJ 280; [2001] 7 CLJ 249, the definition is a 'negative test'. One must examine whether it is illegal for the accused to omit to do what is called into
I question. SAC Zulkifli and ASP Noraidin had given unchallenged evidence that the accused had been ordered to gather intelligence information and transmit the same to the latter in his capacity as the head of the Special Branch in the Lahad Datu District Police Headquarters. In my view, the omission of the accused to do so after having received information from PW1 and after

having been privy to more information relating to the same matter as evidenced by P6 and P7 is illegal. Section 20(1) of the Police Act 1967 (Revised 1988) provides as follows:

> 20 (1) Every police officer shall perform such duties and exercise such powers as are by law imposed or conferred upon a police officer, and *shall obey all lawful directions* in respect of the execution of his office which he may from time to time receive from his superior officers in the Force. (Emphasis added.)

[51] Section 20(3) of the Police Act 1967 (Revised 1988), in part provides as follows:

> (3) Without prejudice to the generality of the force-going provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in section 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including-
>
> (a) …
>
> (b) processing security intelligence;
>
> (c)–(m)

[52] As an officer with the Special Branch tasked with gathering intelligence on the Sulu threat in a frontline district such as Lahad Datu, the accused had been lawfully directed by his superior officers to transmit important information pertaining to the said threat. Therefore, the accused was 'legally bound' to pass the information to his superiors. It would be patently obvious to any reasonable person that information about a group of men in camouflage uniforms moving towards the Lahad Datu coastline to stake a territorial claim would entail commission of terrorist acts. However, the accused failed to give the said information to his superiors even at the police briefing prior to his arrest. The accused was arrested on 3 March 2013. ASP Noraidin told the court that there was a briefing the previous night at the Lahad Datu District Police Headquarters but the accused did not bother to pass any information to him. As the accused did not give the crucial information that he received from PW1 or other information that he was privy to as evidenced by P6 and P7, it must be taken that he omitted to give information intentionally. The legal maxim that a man is presumed to have intended his acts also applies to his omissions. This principle was lucidly stated by Howes J in the old case of *Chung Kok Yeang v Public Prosecutor* [1941] 1 MLJ 163 as follows:

> It is clear that the appellant was legally bound under a statutory obligation to exhibit the inventory. His omission to do so was proved; and if the omission cannot be accounted for, it must be regarded as intentional. A man is presumed to have intended his acts; and this applies with equal force to his omissions.
>
> As to what amounts to an intentional omission, the question is one of fact, and depends on the circumstances of the case.

A THE MOTIVE

[53] Absence of motive is generally not relevant in law for the reason that motive is not an ingredient of criminal offences. However, evidence of motive is admissible under s 8 of the Evidence Act 1950 as motive can provide B corroborative evidence. In the instant case, the prosecution had also tendered cogent and credible evidence of motive in respect of the failure of the accused to give crucial information to his superiors. The said evidence is as follows. PW2 testified that she intercepted and listened in to a conversation between one Datu Amir Bahar and the said Raja Muda Agbimudin on 25 February C 2013. When questioned as to how she knew their identities, she said as follows:

> Q: Bagaimana kamu tahu panggilan tersebut dibuat oleh Datu Amir Bahar kepada Raja?
>
> A: Dengan memantau rakaman sasaran setiap hari. Saya dapat mengecam suara dan melalui perbualan telefon lain ke nombor lain di mana ada D menyebut identiti mereka.

[54] The non verbatim transcript of the conversation was translated and recorded by PW2 in P5. In P5, Datu Amir Bahar and Raja Muda Agbimudin E are heard making a reference to the accused as 'part of our family' and that the accused had given information to Datu Amir Bahar about the Malaysian forces plan to enter the area at 12 midnight. Part of the transcript is as follows:

> Pada 25 Februari 2013 jam 22.31 Datuk Amir Bahar menyatakan dia mendapat tahu daripada Hassan yang merupakan anggota Polis yang mana pihak berkuasa F Malaysia akan masuk jam 12.00 tengah malam nanti. Raja maklum dan memberitahu mereka telah bersedia. Datu Amir Bahar memberitahu Hassan dan Hussin merupakan adik beradik dan mereka juga merupakan ahli 'keluarga kita'. Raja maklum dan beritahu mereka telah sedia.

G **[55]** SAC Zulkifli testified that from his visit to Kampung Tanduo, he learnt that Raja Muda Agbimudin is the younger brother of Datu Esmail Kiram who is the purported heir to the so-called Sulu Sultanate. The prosecution also tendered evidence that the accused made telephone calls to Raja Muda Agbimudin on 13 February 2013 and 17 February 2013. The prosecution H tendered the itemised handphone telephone records of the accused which contains logged calls to a handphone number that was given to SAC Zulkifli to contact Raja Muda Agbimudin. Thus in my judgment, the prosecution is correct to submit that the accused intentionally did not disclose the information that he received from PW1 and the information that is contained I in P6 and P7 because he had a good relationship with the Sulu Sultanate.

THE OTHER ISSUES

[56] Counsel for the accused submitted that Inspector Yusri and Inspector

Syazwan of the Lahad Datu District Police Headquarters should have been called by the prosecution instead of being merely offered as witnesses to the defence. This is because PW1 told the court that he was told to pass information to the accused if Inspector Yusri was not around. PW1 also told the court that previously he had shared 'national security' information with Inspector Syazwan. Counsel for the accused then proceeded to submit that the accused had been made a 'scapegoat'. In my view, adverse inference need not be drawn against the prosecution for not calling Inspector Yusri and Inspector Syazwan because their evidence is not necessary to unfold the narrative upon which the prosecution's case was based. PW1 clearly said that the information in question, ie that 1,500 men in the Philippines were planning to enter Sabah to stake a territorial claim was given only to the accused. The failure of the accused to disclose this information to his superiors is the gravamen of the charge against him. Therefore, with respect, I fail to see what gap Inspector Yusri and Inspector Syazwan could possibly fill in the prosecution's story.

[57] Learned counsel for the accused also submitted that the accused had been made a scapegoat because the police had advanced warning of the armed intrusion by foreigners on 12 February 2013. This is because SAC Zulkifli told the court that he had coffee in Kota Kinabalu with Datu Ismail Kiram who is the brother of Raja Muda Agbimudin in December of 2012. In my opinion, learned counsel for the accused had misapprehended the testimony of SAC Zulkifli about the meeting with the Datu Ismail Kiram. SAC Zulkifli told the court that he wanted to meet Datu Ismail Kiram because he heard that he was in Kota Kinabalu. I see nothing unusual about SAC Zulkifli's meeting with Datu Ismail Kiram. SAC Zulkifli as the Deputy Head of the Special Branch is naturally involved in intelligence work especially on the threat posed by the Sulu territorial claim on Sabah. However, SAC Zulkifli said he did not receive any information from Datu Ismail Kiram about any imminent intrusion into Sabah by the Sulu Sultanate's forces. He said as follows during cross-examination:

> Q: I put it to you that way back December last year, you or your department in IPK Sabah knew of the possible intrusion by this group.
>
> A: No.
>
> Q: Since you disagreed, what was the reason that you met Datu Esmail Kiram?
>
> A: I was told of his presence in Kota Kinabalu, so I took the chance to see him so that we can know each other, so I took him for a coffee.

[58] During re-examination, SAC Zulkifli categorically denied that he received any information of the armed intrusion from Datu Ismail Kiram in December of 2013:

> Q: Semasa kamu jumpa Datu Esmail Kiram pada Disember 2012, adakah atau tidak Datu Esmail Kiram sebut mengenai tentera Kesultanan Sulu akan menceroboh Sabah?

A: Tidak disebut langsung.

[59] Learned counsel for the accused also submitted that Datu Ismail Kiram had entered Sabah illegally in December of 2012 and that SAC Zulkifli should have arrested him. However, there is no evidence that Datu Ismail Kiram was in Sabah illegally in December of 2012. The evidence from SAC Zulkifli during cross-examination is as follows:

Q: I supposed that Datu Esmail Kiram entered Sabah legally?

A: Yes.

[60] In the premises, the submission that SAC Zulkifli had information about the planned armed intrusion into Kampung Tanduo as early as December of 2012 is not supported by evidence.

[61] In conclusion, I was satisfied that the prosecution had tendered credible evidence in respect of all the ingredients of the offence. I found that the prosecution had established a prima facie case and I called for the accused to enter his defence.

THE DEFENCE

[62] The accused elected to give an unsworn statement from the dock. He did not call any witnesses. His lengthy 20 page statement which was read in court can be considered under the following headings.

THE DENIAL OF KNOWLEDGE

[63] The accused denied receiving critical information from the PW1 about the 1,500 men who had gathered in Siminul and were planning to claim Sabah. He also denied receiving the information from PW1 about the four boats (*pintel*) with men wearing camouflage uniforms that had entered Bangkuran in Lahad Datu. The accused said he suspects that PW1 is an informer who is controlled by Inspector Syazwan and ASP Yusri. However, the accused alleged that PW1 had lied in court as part of the 'propaganda' of the Special Branch to fix him.

[64] The accused denied the contents of P6 and P7 which is the gist of the conversation between him and 'lelaki Sabah' that was recorded and translated by PW2. The accused said that it was fabricated. He said that he is not the 'Hassan' that is referred to by Datu Amir Bahar and Raja Agbimuddin in P5. The accused also said that he was arrested on 2 March 2013 and therefore could not have received the calls from 'lelaki Sabah'.

THE MEETING WITH DATU PIAH

[65] Surprisingly, the accused said in his statement that he met with Datu Piah in Lahad Datu town on 13 February 2013 which is one day after the armed intrusion into Kampung Tanduo by the followers of the Sulu Sultanate. Datu Piah was with the leader of the intruders, ie Raja Agbimuddin when SAC Zulkifli visited the enemy encampment at Kampung Tanduo on 16 February 2013. Datu Piah allegedly told the accused during their meeting on 13 February 2013 in Lahad Datu town that his group had come to claim 'what is rightfully the Sulu Sultanate's', 'to request the Government of Malaysia to review the payment of RM5,000' and 'to make Kampung Tanduo their settlement'. Datu Piah also told the accused that 'the intruders will defend themselves if attacked'. However, the accused did not make a written intelligence report of this meeting to his superiors as he was on leave. He said he left for Kota Kinabalu the following day to arrange his son's engagement. However, he told an officer on duty at the Lahad Datu Special Branch Operations Room about the said meeting.

THE INTELLIGENCE INFORMATION ALLEGEDLY DISCLOSED BY THE ACCUSED

[66] The accused said in his statement that he gave various pieces of intelligence information in respect of the Sulu threat to fellow Special Branch officers. He said on 19 February 2013–2 March 2013, the Special Branch officers in Lahad Datu were directed to gather intelligence information on the Sulu Sultanate threat to Sabah. The accused said in his unsworn statement that he gathered some information that was fed into Corporal Ajerah's computer. However, he did not specify the nature of the information. During that time, the accused said he made many phone calls to the Philippines to gather information from his sources. One such source was 'Istino bin Jair'. The accused received information from Istino bin Jair on 21 February 2013 that Suluks from Basilan, Jolo and Tawi-Tawi would be backing Datu Ismail Kiram. The accused said he gave this information to Sergeant Major Safuan. Another source of the accused, one 'Abdul Rajan' of the Integrated National Police in Basilan told him that the Basilan group would not be assisting Datu Ismail Kiram. The accused said he disclosed the above information during the morning meeting at the Special Branch Operations Room. On 1 March 2013, the accused received information from another source by the name of 'Sid' that his aunt in the Philippines told him that 200 Sulus were on standby in Bungao to provide back up to the others. The accused said he relayed this information to the Special Branch Operations Room in Lahad Datu. On the same day at 11pm he received another telephone call from 'Sid' telling him that about 400 Sulu men would be entering Semporna. The accused said he was on patrol with Corporal Ambo Dale when he received the said call. As he was driving that

time, he requested Corporal Ambo Dale to the pass the information via SMS to the Special Branch operations room in Lahad Datu.

THE 'SCAPEGOAT' CLAIM

[67] A recurring theme in the unsworn statement is that the accused had been made a scapegoat in the Sulu armed intrusion affair. The accused said as follows:

> Semua bukti yang dikemukakan oleh pihak Polis Cawangan Khas adalah tidak betul, berat sebelah dan hanyalah propaganda untuk mengenakan dan menyebabkan saya menjadi kambing hitam mereka dalam peristiwa pencerobohan pengikut Kesultanan Sulu di Kampung Tanduo Lahad Datu.

[68] He said there are many officers working in the Special Branch at the Lahad Datu Police Station including Corporal Salsagap, Sergeant Konsol and Corporal Haya who are fluent in the Suluk language. He also said all Special Branch officers in Lahad Datu were involved in gathering intelligence information on the threat posed by the Sulu Sultanate. He said that if the head of the Sabah Special Branch did not receive any information on the Sulu threat, it means that his colleagues in Lahad Datu such as Corporal Ajerah, SM Safuan, Inspector Syazwan, ASP Yusri and ASP Noraidin also did not give any information. The accused said he never received any instruction since the time he joined the police force in 1975 to give information in writing. In 2002, he was tasked with monitoring the visit of Datu Ismail Kiram to Lahad Datu but he was not asked to present a written report to his superiors. When Datu Ismail Kiram again visited Lahad Datu in 2006 to present Sulu Sultanate identity cards to 50 residents, he was again asked to monitor his movements only. He said even SAC Zulkifli did not give any written report of his visit to Kampung Tanduo when he met the leaders of the armed group. The accused also echoed the cross-examination questions that were put to SAC Zulkifli when he said that SAC Zulkifli had prior information about the armed intrusion into Sabah because he met Datu Ismail Kiram in Kota Kinabalu in December of 2012. The accused said that SAC Zulkifli did not give any briefing about the Sulu threat to Sabah to the Special Branch officers in Lahad Datu. He also did not show them the letters that were given to him by Raja Agbimuddin. He said the investigating officer of this case was not given the said letters either. Finally, the accused said that he had nothing to do with the deaths of the two VAT69 personnel in Kampung Tanduo. He denied involvement with terrorists or terrorist activity in relation to the Sulu Sultanate's claim on Sabah.

THE LEGAL ARGUMENTS IN THE UNSWORN STATEMENT

[69] The unsworn statement of the accused also contains a number of legal

arguments. The accused said the 'sensitive letters' pertaining to the claim of the Sulu Sultanate that were given to SAC Zulkifli in Kampung Tanduo did not contain any 'terrorist element' but was merely a claim for their right over Sabah. The accused said that the telephone interception conducted by PW2 was in contravention of s 6(1)(c) of the SOSMA as she was not a police officer but an administrative assistant. He also said a police officer fluent in the Suluk l anguage could have been asked to intercept the said communications. Finally, he said that the actual recording of the intercepted conversation should have been made available to the defence.

THE WEIGHT TO BE GIVEN TO UNSWORN STATEMENT

[70] In the instant case, the accused has given an unsworn statement and his counsel closed the case for the defence without calling any witnesses. The right of an accused to give an unsworn statement is a substantive right (see *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104). The weight to be given to an unsworn statement has been a matter of some debate in the past among judges but the current consensus of opinion was neatly summed up by Zulkefli J (as His Lordship then was) in *Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406; [2002] 5 CLJ 281 in the following passage:

> The position in law is that the right of an accused person to make an unsworn statement from the dock is a substantive right. However, we must bear in mind that statement from the dock is not sworn evidence which can be the subject of cross-examination. Not so much weight can be given to what the accused said in the dock when compared to what the accused would give under sworn evidence. This is so because when a man gives evidence one can cross-examine him and test his evidence and generally have a better opportunity of assessing him. Nevertheless, the law is very clear that the court cannot outright reject such evidence. The court must consider it and give it such weight for what it is worth and think fit having regard to the evidence adduced as a whole before the court.

[71] In my view, the learned DPP is not off the mark as well when he distilled the following principles from the cases that he cited (see *Lee Boon Gan v Regina* [1954] 1 MLJ 103, *Udayar Alagan & Ors v Public Prosecutor* [1962] 1 MLJ 39, *Juraimi bin Husin v Public Prosecutor; Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor* [1998] 1 MLJ 537:

(a) A statement from the dock is evidence for whatever it is worth;

(b) Because it is not made under oath and not subject to cross examination, it is not entitled to the same weight as a statement given under oath;

(c) But the judge may wonder why the accused person elects to do so. While the judge cannot draw adverse inference, he certainly can draw

A appropriate inference with regards to the refusal or reluctance of the accused to give evidence on oath and to subject himself to cross-examination; and

(d) At the end of the day, the court is free to give the dock statement the weight it deserves or not at all, having regard to the whole of the evidence
B in the case.

THE DUTY OF COURT AT END OF DEFENCE CASE

C **[72]** Section 182A of the Criminal Procedure Code provides at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whetherthe prosecution has proved its case beyond reasonable doubt. In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, the Federal Court said as follows in respect of the 'doubt' that will warrant an acquittal:

D

> To warrant an acquittal however the doubt created must not merely be a *fleeting doubt* or a *capricious doubt* but a doubt in respect of which a substantial reason can be given. The question to ask now is — has the defence evidence created a reasonable doubt on the truth of the prosecution story? (Emphasis added.)

E

[73] Much earlier in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 which was cited by the learned DPP, Sharma J emphasised that mere doubt is not sufficient to earn an acquittal in the following passage:

F

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

G

[74] The learned DPP also cited the famous definition of 'reasonable doubt' by Denning J (as he then was) in *Miller v Minister of Pensions* [1947] 2 All ER 372 where he said (at p 373):

H

> (The degree of cogency) … need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be
I dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[75] With the above directions in mind, I shall now consider whether a reasonable doubt has been raised in the prosecution's case.

WHETHER REASONABLE DOUBT?

[76] The most critical piece of information that the accused allegedly did not disclose to his superiors or any officer of the Special Branch is the information given to him by PW1 about the 1,500 menwho had gathered in Bungao to enter Sabah. Although, PW1 is a 'protected witness' under the SOSMA, he gave sworn evidence which I found to be credible. He was not shaken in cross-examination. It was also not demonstrated through cross-examination that PW1 would have a reason or some motive to concoct a horrendous lie against the accused. In the unsworn statement, the accused has simply alleged that the whole of his evidence is mere Special Branch 'propaganda' to fix him. He did not offer any cogent reason why the Special Branch would go to such lengths to victimise one of its own officers. Similarly, the accused said that the conversations recorded in P5, P6 and P7 were fabricated to make him a scapegoat. It must be noted that PW2 has given sworn testimony that she was carrying out the instructions of her superior officer when she translated and transcribed the intercepted conversations. During cross-examination, PW2 said she does not know the accused. She flatly denied that the suggestion that the contents of P5, P6 and P7 are not truthful. Again, I see no reason why PW2 would want to fabricate incriminating evidence to victimise the accused. As she is a protected witness, her identity was not revealed to the defence. However, counsel for accused was given full liberty to cross-examine her at length. I was fully satisfied that she does not know the accused person and has no reason to fabricate evidence against him. The accused also said in his unsworn statement that he was arrested on 2 March 2013 at 1pm and therefore he could not have received the phone calls from 'lelaki Sabah'. The telephone call in respect of P6 was received by the accused at 7.37pm on 2 March 2013 whereas the call in respect of P7 was received at 9.28am on 3 March 2013. However, the investigating officer of the case, ASP Ang Seow Aun ('PW18') gave unchallenged evidence that the accused was arrested on 3 March 2013. Counsel for accused also did not put to the investigating officer that it would not have been possible for the accused to receive calls from 'lelaki Sabah' because he was already under arrest by that time. In the premises, the allegation in the unsworn statement that the accused was arrested on 2 March 2013 is without factual basis. The other essential point to note about the denial of the accused in respect of the incriminating evidence given by PW1 and PW2 is this. The accused in his unsworn statement is not merely attempting to explain away the evidence of the PW1 and PW2 by referring to other established facts. The accused is saying that both PW1 and PW2 had lied outright and had fabricated evidence. In the premises, the unsworn statement of the accused which is not subject to cross-examination cannot be given the same weight as sworn testimony which is tested by cross-examination.

[77] The accused in his unsworn statement had said that he received some

crucial information from Datu Piah on 13 February 2013. However, he said that he could not give a written report to his superiors as he was on leave and had left for Kota Kinabalu the following day. He also said that he gave the information to an officer on duty at the Lahad Datu Special Branch Operations Room. However, as pointed out by the DPP, the accused was in Lahad Datu on 14 February 2013. Corporal Ajerah ('PW14') told the court that the accused assisted her in preparing a Power Point presentation at the Lahad Datu Police Station. The accused also did not identify the duty officer to whom he had verbally given the crucial information from Datu Piah. His counsel did not put to any of the prosecution witnesses, including Corperal Ajerah that the accused had revealed the information that he received from Datu Piah. The accused also said in his unsworn statement that he met Corporal Ajerah on 18 February 2013 as he was on leave in order to justify his failure to make a written report. However, this meeting was not put to Corporal Ajerah as well when she took the witness stand.

[78] For all the above reasons, the explanation given by the accused in his unsworn statement is not believable.

[79] The accused had also told the court that he had given many pieces of intelligence information to Corporal Ajerah to be fed into her computer after it was typed by Corporal Kifli. However, this defence was also not put to Corporal Ajerah. The accused said that he gave intelligence information from one 'Istino bin Jair' to Sergeant Major Safuan (PW13). However, Sergeant Major Safuan denied receiving any information about the Sulu threat from the accused. He said as follows:

> Q Sepanjang kamu menjadi pegawai penyelia kepada tertuduh, adakah tertuduh ada melaporkan apa-apa maklumat berhubung Kesultanan Sulu dan ancamannya secara lisan atau bertulis kepada kamu?
>
> A Tidak ada.

[80] In respect of the information from a source named 'Sid', the accused said the information was related to the Special Branch Operations Rooms at Lahad Datu. However, ASP Noraidin who is the head of the Lahad Datu Special Branch denied receiving any information from the accused about the Sulu threat. The cross-examination of ASP Noraidin and Sergeant Major Safuan failed to elicit any good reason why they would want to fabricate lies or concoct evidence to victimise the accused. They had categorically stated that the accused did not give them the information in question. For this reason, the unsworn statement of the accused cannot be given the same weight as sworn testimony.

[81] The accused said in his unsworn statement that he was made a

scapegoat. He said he was never asked to give a written report or written information about the Sulu threat. He referred to earlier instances where he was only tasked with monitoring the visit of Datu Ismail Kiram to Sabah. However, the charge in question is not that he failed to give 'written' information. The essence of the charge is omission to give any information respecting a s 130C offence. Therefore the accused was legally bound to give information respecting a s 130C offence either orally or in writing. SAC Zulkifli and ASP Noraidin had testified unchallenged that the accused had been ordered to gather intelligence information on the Sulu threat and transmit the same to the latter in his capacity as head of the Special Branch in the Lahad Datu District Police Headquarters. The accused also pointed a finger of accusation at SAC Zulkifli in his unsworn statement. He said in his unsworn statement that SAC Zulkifli admitted meeting Datu Ismail Kiram in December of 2012 but did not give any briefing about the Sulu threat to Sabah to the Special Branch officers in Lahad Datu. The accused added that the Special Branch knew of the possibility of armed intrusion into Sabah by the Sulu Sultanate because of the said meeting between SAC Zulkifli and Datu Ismail Kiram. In my opinion, this allegation in the unsworn statement of the accused is baseless and speculative. SAC Zulkifli clearly said in his evidence that he only met Datu Ismail Kiram to get to know him. He denied receiving any information about possible intrusion by the followers of the Sulu Sultanate. SAC Zulkifli emphatically said that the first information he received on the Sulu armed intrusion was on 12 February 2013.

[82] The accused raised some legal points in his unsworn statement as well. He said that the recording of the intercepted conversation in P6 and P7 was not tendered to enable him to determine whether it was his telephone conversation. Insofar as admissibility is concerned, I have addressed it when dismissing the argument of counsel for the accused that the transcript in P5, P6 and P7 is a summary and a non verbatim transcript. Section 24 of the SOSMA Act provides that any information obtained through an interception of communication under s 6 shall be admissible as evidence. As for the weight to be attached to P5, P6 and P7, PW2 said that she recognised the voices of the speakers as she had been monitoring other intercepted telephone conversations. In my view, weight ought to be given to her evidence as she came across as a credible witness for reasons given earlier. The accused said in his unsworn statement that PW2 is not a police officer and therefore cannot participate in the interception of telephone conversations. I have addressed this point earlier. The accused also said that the 'sensitive' letters pertaining to the Sulu Sultanate's claim over Sabah which was given to SAC Zulkifli did not contain any 'terrorist element' but was merely an assertion of their rights. In my view, this point is thoroughly irrelevant to the charge. The charge does not pertain to the legal basis of the Sulu Sultanate's claim over Sabah. It pertains to omission to give information respecting a 130C offence. As I said earlier, the prosecution tendered ample evidence that an armed group of men landed in

Kampung Tanduo and caused the deaths of two Malaysian policemen. The prosecution had successfully linked the said armed group to the information given by PW1 to the accused in January of 2013.

[83] Finally, I shall address the point of counsel for the accused that defence should not have been called in the first place. In my view, this submission has no merit for the reason that the task of a trial judge in a criminal case at the end of the case for the defence is to determine whether there is a reasonable doubt on the whole of the case. In this exercise, he must consider the entire evidence adduced. However, he is not obliged to 'reevaluate' the evidence tendered at the close of the prosecution's case as that would involve revisiting findings of fact that were relevant for holding that there was a prima facie case (see *Abdul Karim Kula v Public Prosecutor* [2009] 10 CLJ 1).

THE DECISION

[84] For all the above reasons, I find that the defence disclosed in the unsworn statement is unbelievable. I have also considered whether the unsworn statement, though I disbelieve it, raises a reasonable doubt in the case for the prosecution. I find that it does not. It is simply a bare denial which is unsupported by credible evidence. In conclusion, it is my finding that the unsworn statement, when considered in its totality and evaluated in the light of the prosecution's evidence, does not raise a reasonable doubt against the whole of the prosecution's case. I therefore find that the prosecution has proved the guilt of the accused beyond reasonable doubt. I find the accused guilty and convict him of the offence with which he is charged.

THE SUBMISSION ON SENTENCE

[85] Counsel for the accused submitted the following mitigating factors on behalf of the accused. The accused is 61 years old. He joined the police force in 1975. He has served in various districts in Sabah. He is in poor health since suffering a cerebral stroke in 2010. He is afflicted with hypertension and diabetes as well. In respect of the offence, counsel for the accused submitted that the accused was a victim of circumstances. In respect of the sentence, counsel for the accused pointed out that there is no minimum punishment provided under s 130M and that the maximum term of incarceration is only seven years. Counsel for the accused suggested a sentence of five months imprisonment from the date of arrest.

[86] The learned DPP on the other hand pressed for the maximum punishment that is provided under the law. His reasons are as follows. The accused had committed an offence that affected the country's sovereignty and security. The accused, in the course of his duty as a Special Branch officer

received critical information about armed intrusion by foreigners. Had the accused disclosed this information to his superiors, the security forces would have been better prepared to deal with the intruders and could even have prevented them from coming to Sabah. Therefore, he urged the court not to consider the lengthy service of the accused as a mitigating factor. As for his health condition, he submitted that it is not a significant mitigating factor as the accused is not seriously ill.

THE SENTENCE

[87] The general principles of sentencing were restated in the famous case of *R v Sargeant* [1975] 60 Cr App R 74 simply as retribution, deterrence, prevention and rehabilitation. However, the consideration that should be given to these principles would depend very much on the facts of the case as no two cases are alike. For example, in the case of *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, the Supreme Court gave emphasis to the elements of retribution and deterrence because of the prevalence of criminal breach of trust cases.

[88] I am mindful that the accused is the first person to be charged under s 130M of the Penal Code. For this reason, there can be no argument that the offence in question is prevalent. Nonetheless, I am persuaded by the learned DPP that a deterrent sentence is called for in this case. It is apparent to all that the offence for which the accused has been convicted is very serious. The accused is not an ordinary member of the public. He served as a Special Branch officer in the front line district of Lahad Datu. I call it a front line district because it faces the Southern Philippines. SAC Zulkifli told the court that the Sulu Sultanate's is still claiming Sabah as their territory. ASP Noraidin told the court that Special Branch officers in Lahad Datu had been tasked with gathering intelligence in respect of the threat posed by the Sulu Sultanate's claim over Sabah. The offence committed by the accused is that he deliberately withheld crucial information pertaining to armed intrusion into Sabah by foreigners who in all likelihood were staking a territorial claim. As argued by the learned DPP, it is completely foreseeable that Malaysian Security Forces would have been better prepared to face the heavily armed foreigners if the accused had given the information in question to his superiors. In a sense, he had betrayed his country by withholding critical information that could have saved lives. His betrayal had directly or indirectly threatened the security of the country. It has been said that the personal circumstances of an accused person must be taken into account in sentencing. The accused has served the police force for 38 years and is now in poor health. However, the sentencing court is also obliged to strike a balance between the personal circumstances of the accused and the public interest. In my opinion, the mitigating factors based on the long service of the accused and his previous good character pales into

A insignificance when compared to the enormity of his crime. Therefore very little credit should be given to these factors. For the same reason, the poor health of the accused is not relevant either. The accused, despite suffering a stroke three years ago, was healthy enough to resume work and the crucial information that he withheld was received in the course of his official duty.
B Therefore it is inappropriate to consider poor health as a mitigating factor. The maximum punishment for the offence is seven years imprisonment and fine. The learned DPP has urged the court to impose the maximum punishment. The established principle of sentencing is that the maximum penalty is intended only for the worst cases where the feelings of the community have
C been outraged (see *Sia Ah Kew & Ors v Public Prosecutor* [1974] 1 MLJ 125). In my opinion, although the accused is a first offender, for reasons given above, this is such a case. I shall therefore impose the maximum penalty of seven years imprisonment from date of arrest.

D *Accused convicted and sentenced with offence charged.*

Reported by Ashgar Ali Ali Mohamed

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